Office Supreme Court, U. S.
FILED
OCT 22 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1914

No. 643

AMERICAN SURETY COMPANY OF NEW YORK,

Plaintiff in Error,

against

GEORGE S. SHULTZ,

(In error to the District Court of the United States for the Southern District of New York.)

MOTIONS TO AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

KELLOGG & ROSE,

Attorneys for Defendant in Error.

Laplante & Dunklin Printing Co., 26 South William St., New York

In the Supreme Court of the United States

AMERICAN SURETY COMPANY OF NEW YORK, *Plaintiff in Error,* *against* GEORGE S. SHULTZ, *Defendant in Error.*	October Term 1914 No. 643

MOTION TO AFFIRM OR TO TRANSFER TO THE SUMMARY DOCKET.

Now comes the above named Defendant in Error, by his attorneys of record herein, and moves this Honorable Court:

First: To affirm the judgment of the District Court of the United States for the Southern District of New York, at law, on the ground that it is manifest that this appeal was taken for delay only, and that the questions on which the decision of this cause depends are so frivolous as not to need further argument.

Second: If this Court should refuse to affirm, then to transfer this cause for hearing to the Summary Docket, because the cause is of such a character as not to justify extended argument.

KELLOGG & ROSE,
Attorneys of Record for Defendant in Error.

NOTICE OF MOTIONS.

To: AMERICAN SURETY COMPANY OF NEW YORK,
Plaintiff in Error:

You Are Hereby Notified that the Defendant in Error in the above entitled cause will on Monday, the 16th day of

November, 1914, at the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of said Court the foregoing motions and each of them, and the brief in support thereof hereto annexed, all of which are now served upon you herewith.

Yours, etc.,

KELLOGG & ROSE,
Attorneys for Defendant in Error.

Statement of the Facts and Objects of the Motions.

This action was brought to recover the sum of $25,-106.50, with interest, on a supersedeas bond executed by James A. Whitcomb, as principal, and by the Plaintiff in Error, American Surety Company of New York, as surety, in the sum of $30,000, to secure a stay pending a hearing by the Circuit Court of Appeals for the Second Circuit on a Writ of Error to the District Court for the Southern District of New York to review a judgment in favor of the Defendant in Error, George S. Shultz, against said James A. Whitcomb for the sum of $25,106.50, entered upon a verdict rendered upon a trial on the law side of said District Court to recover damages for the breach of a contract. (See Record, pp. 3-5, fols. 6-9.)

To the complaint the Plaintiff in Error (Defendant below) interposed a demurrer on the grounds:

(1) That the District Court had no jurisdiction of the subject matter of the action, in that

(2) No diversity of citizenship of the parties was shown by the complaint; and

(3) That the action was an original action based solely upon a contract, to wit: the bond set forth in the complaint; and

(4) That neither the Constitution nor any Law of the United States was involved in the cause of action alleged; and

(5) That said action did not involve the consideration or application of such Constitution or Law; and

(6) That said action did not involve any question of the validity of such Law or of any State Law; and

(7) That said action did not involve any matter or question within the jurisdiction of the said District Court or any United States Court.

(See Record, p. 6, fol. 11.)

The judgment in favor of the Defendant in Error against said Whitcomb, to secure a stay of the enforcement

of which pending the review thereof by the Circuit Court of Appeals the bond in question was given, grew out of a contract entered into between the Robertson Sales Company, a New Jersey corporation, and the Great American Automatic Vending Machine Company, also a New Jersey corporation, for the manufacture by the Machine Company of ten thousand vending machines, under patents pending of the Sales Company, "like to the model" deposited by the Sales Company (except as to certain alterations specified in the agreement), including all dies, patterns, special tools, etc., necessary for the manufacture of said machines, for the sum of $46,000.

In consideration of the making of the contract, and of the sum of $1.00 paid by the Machine Company, said Whitcomb executed a written guarantee to the effect that the Sales Company would faithfully perform and fulfill the contract on its part.

The Machine Company proceeded in the performance of the contract and continued therein until January 1st, 1910, at which time 2100 machines had been manufactured and delivered. On that date the Sales Company refused absolutely to accept further deliveries under the contract and wholly repudiated the same for the reason, as claimed, that a large number of machines would not work and were worthless.

After the repudiation of the contract, an action was commenced by the Defendant in Error, as the assignee of the Machine Company, against said Whitcomb on his guarantee of the contract, in the Supreme Court of the State of New York, to recover damages for said breach, which action subsequently, upon the application of Whitcomb, was removed to the United States Circuit Court for the Southern District of New York, on the ground of the diverse citizenship of the parties, said Shultz being a citizen of the State of New York and said Whitcomb being a citizen of the State of Oklahoma.

The action came on for trial before the *Hon Julian W. Mack* and a Jury at a Term of the District Court (the Circuit Court in the meantime having been abolished), which trial lasted for a period of nearly three weeks. The Jury

returned a verdict in favor of the Defendant in Error for the sum of $24,607.95, upon which verdict a judgment was entered for the sum of $25,106.50 damages and costs.

A Writ of Error was sued out by Whitcomb to review said judgment by the Circuit Court of Appeals for the Second Circuit, and to stay the execution thereof pending the hearing the supersedeas bond referred to in the complaint was given. After due hearing the judgment was affirmed by the Circuit Court of Appeals.

On said appeal the principal contention by Whitcomb was that the Machine Company was itself obliged to manufacture all the various parts of the machine, and that it violated said contract by purchasing some of the parts from independent dealers and supply houses, and by allowing the dies, patterns, etc., to leave its possession during performance to enable other dealers to furnish some of the necessary parts.

This contention was overruled by the Circuit Court of Appeals on the ground that under the terms of the contract the obligations of the Machine Company were performed if the machines were manufactured "like to the model" deposited, and that no obligation rested upon it to manufacture itself all the various parts of the machines, but it was at liberty, as it did, to purchase some of the parts from independent dealers, and had the right to allow the dies and patterns to leave its possession during performance to enable other dealers to furnish some of the necessary parts, and that the Jury having found that the machines manufactured were like the model, the plaintiff was entitled to recover.

(See Opinion, *Ward*, J., annexed hereto.)

After the affirmance by the Circuit Court of Appeals, an action was begun in equity by Whitcomb to restrain the enforcement of the judgment on the ground that the contract had been induced by fraudulent representations made by the Machine Company as to its experience in and its facilities for the manufacture of vending machines, which defense, being an equitable defense, it was claimed, he was precluded from interposing in the action at law.

An order to show cause why an injunction *pendente lite* should not issue was granted by *District Judge Hand,* together with a restraining order staying all proceedings for the enforcement of the judgment until the hearing and decision of the motion.

On the return of the order to show cause, *Judge Hand* rendered a decision denying the motion for a temporary injunction and vacating the restraining order on the ground that it having been decided by the Circuit Court of Appeals that the Machine Company was not obliged to manufacture all of the various parts itself and that its obligations were fulfilled by the manufacture of machines like the model submitted, the alleged misrepresentations as to the experience and facilities of the Machine Company were as to entirely immaterial and irrelevant facts and afforded no ground whatsoever for the equitable interference of the Court.

(See Opinion, *Hand,* J., annexed hereto.)

After the denial of the motion for a temporary injunction, the defendant moved under Equity Rule 29 for judgment on the pleadings, which motion came on for hearing before *Circuit Judge Lacombe,* who granted the same and directed judgment dismissing the complaint, the learned Judge stating in a memorandum handed down by him that he fully concurred with *Judge Hand's* opinion.

(See Memorandum, *Lacombe,* J., annexed hereto.)

Thereupon the present action was begun to recover upon the supersedeas bond referred to. Upon the commencement thereof an action in equity was begun by the Plaintiff in Error to restrain the prosecution of said action, alleging the same facts as in the action in equity brought by Whitcomb to restrain the enforcement of the judgment, and on the further ground that the District Court was without jurisdiction to entertain the action because there was no diversity of citizenship alleged.

A motion was made by the defendant for judgment on the pleadings dismissing the complaint in that action, on the ground that the facts therein alleged did not constitute a cause of action in equity.

The motion came on for hearing before *Circuit Judge Lacombe* and was granted, and the complaint was directed to be dismissed. By the dismissal of the complaint *Judge Lacombe* necessarily decided—

(1) That the alleged misrepresentations referred to were as to entirely immaterial and irrelevant facts; and

(2) That the District Court had jurisdiction to enforce liability on the supersedeas bond, notwithstanding no diversity of citizenship was alleged.

After the decision by *Judge Lacombe* a demurrer to the complaint in the present action was interposed, wholly and solely on the ground, as appears on the face thereof, that the District Court was without jurisdiction of the action.

(See Record, p. 6, fol. 11.)

Thereupon a motion for judgment was made by the Defendant in Error under Section 537 and Section 547 of the New York Code of Civil Procedure, providing that if a demurrer is frivolous, the party prejudiced thereby, upon notice to the adverse party, may apply to the Court for judgment thereupon and judgment may be given accordingly, which motion came on for hearing before *District Judge Hazel* and was granted on the ground, as appears by his memorandum of opinion, that the District Court clearly had jurisdiction and that the demurrer was wholly frivolous and without merit.

(See Mem., *Hazel*, J., Record, p. 7, fol. 13.)

The printed Record has been filed in the case at bar, which makes it unnecessary to print as a part of this Brief any of the proceedings in the Court below.

Argument of the Motion to Affirm.

The supersedeas bond sued upon was given to procure a stay of the enforcement of a judgment rendered in an action in the District Court pending a review on error by the Circuit Court of Appeals.

An action brought to enforce liability on such a bond, after the affirmance of the judgment, is an action arising under the Laws of the United States, of which a United States Court has jurisdiction irrespective of the citizenship of the parties.

Tullock *vs.* Mulvane, 184 U. S., 497;
Leslie *vs.* Brown, 90 Fed. Rep., 171;
Crane *vs.* Buckley, 105 Fed. Rep., 401;
Files *vs.* Davis, 108 Fed. Rep., 465;
Egan *vs.* Chicago Great Northwestern Ry. Co., 163 Fed. Rep., 344;
Mississippi Valley Fuel Co. *vs.* Watson Coal Co., 202 Fed. Rep., 122;
St. Louis I., M. & S. Ry. Co. *vs.* Bellamy, 211 Fed. Rep., 172;
Arnold *vs.* Frost, 9 Benedict, 267; Federal Cases, No. 558.

In *Tullock* vs. *Mulvane* (*supra*) it was expressly held by this Court that an action on an injunction bond given in the course of proceedings in a Federal Court presented a federal question for review by this Court on Writ of Error to a State Court. *Mr. Justice White,* writing, said:

"It may not, we think, be doubted that a bond for "injunction in an equity court of the United States "given under the order of such court is a bond exe- "cuted in and by virtue 'of an authority exercised un- "der the United States.' Rev. Stat. §709. Certainly, "the courts of the United States derive all their pow- "ers from the Constitution and Laws of the United "States, and their authority is therefore exercised "thereunder. Being, then, an obligation entered into "by virtue of such authority, the conclusion cannot "be escaped that the defense specially set up, that no "liability on the bond could arise until the court of the "United States in which the controversy was pending "had finally determined that the injunction should

"not have been granted, was the assertion of an im-
"munity from liability depending on an authority ex-
"ercised under the United States, and therefore neces-
"sarily involved the decision of a Federal question."

Tullock *vs.* Mulvane (*supra*).

To the same effect is the decision in *Leslie* vs. *Brown* (*supra*) by the Circuit Court of Appeals, Sixth Circuit, in which *Circuit Judge Taft* wrote the opinion and *Circuit Judge Lurton* and *District Judge Severens* concurred. *Judge Taft* said:

"We have no doubt that an action at law in the
"federal court may be brought on such a bond, pro-
"vided the necessary amount is involved, on the ground
"that the plaintiff is enforcing rights secured to him
"under the constitution and laws of the United
"States."

And distinguishing *Merryfield* vs. *Jones* (2 Curt. 306, Fed. Cases No. 9,486), and *Bein* vs. *Health* (12 How., 168), *Judge Taft* said that they were decided at a time when the Circuit Courts of the United States did not have original jurisdiction to enforce causes of action arising under the Laws and Constitution of the United States, which branch of jurisdiction was not conferred until the Act of 1875.

Leslie *vs.* Brown (*supra*).

In *Crane* vs. *Buckley* (*supra*) it was held that an action on a supersedeas bond given on an appeal from the decree of a Circuit Court to the Circuit Court of Appeals, in accordance with the Revised Statutes, Section 1000, to recover the damages sustained by the appellee, was one involving questions arising under the Laws of the United States and was removable into the Circuit Court. *Circuit Judge Morrow* said:

"The writ in this case was a supersedeas and the
"security given therefor extended to damages as well
"as to costs. The question for determination is: Has
"this Court jurisdiction of the action? It has been
"held that such a controversy is one springing out of
"a suit already determined in the Federal Court, and

"is in one sense an offshoot of that suit (Seymour *v.* "Construction Co., Fed. Cas., No. 12,689, 7 Biss., 460); "and further in the same case that a supersedeas bond "is an indemnity given in pursuance of a law of the "United States. The measure of the liability of the "party and the rights of both plaintiff and defendant "depend upon a law of the United States and a rule "of the Supreme Court of the United States (No. 29). "It is impossible to take a step in the progress of a "suit brought upon such a bond in order to determine "the rights of the parties without looking at the law "and the rule as the guide of the Court and controlling "its judgment in the determination of the case. And "in Arnold *v.* Frost, Fed. Cas. No. 558, 9 Ben., 267— "a suit for recovery on a bond given on appeal—the "Court in positive terms declared it to be not an orig- "inal suit but an offshoot or outbranch of the suit in "which the bond was given, and that jurisdiction of the "original suit gave jurisdiction over the subject mat- "ter of the suit on the bond. The action under consid- "eration is based upon proceedings in the United "States Circuit Court acting under authority conferred "by a law of the United States and a rule of the Cir- "cuit Court of Appeals (No. 13). It therefore presents "a question arising under the laws of the United "States, and so within the jurisdiction of this court."

Crane *vs.* Buckley (*supra*).

In *Arnold* vs. *Frost* (*supra*), referred in the opinion last quoted the precise question was presented and decided. *District Judge Blatchford* expressly held that the District Court had jurisdiction of an action brought to recover on a bond on an appeal to the Circuit Court from a final decree in a suit in Equity in the District Court, notwithstanding there was no diversity of citizenship between the parties. He said:

"This Court has jurisdiction of this suit. It is not "an original suit, but it is an offshoot or outbranch "of the suit in which the bond was given, and jurisdic- "tion of that suit gives jurisdiction of the subject mat- "ter of this suit, the defendants having been duly "served with process in this suit."

Arnold *vs.* Frost (*supra*).

Damages at the Rate of Ten Per Cent. Should Be Awarded in Favor of the Defendant in Error.

The cases to which reference has been made, it is therefore submitted, decide the precise question raised by the demurrer in the present action in favor of the jurisdiction of the District Court over the present cause.

The question presented having been repeatedly and conclusively settled adversely to the contention of the Plaintiff in Error, this case is clearly one covered by *Rule 6* of this Court, providing for the affirmance of a judgment on motion where it appears that the appeal is wholly without any merit whatsoever and obviously taken for the purpose of delay only.

If, however, this Court should consider that any question whatsoever is presented which does require argument, then it is respectfully requested that the present case be transferred to the Summary Docket for hearing at an early date.

Damages at the Rate of Ten Per Cent. should be awarded in favor of the Defendant in Error.

It is obvious that the demurrer was interposed solely for the purpose of delay and to prevent the collection of the judgment obtained by the Defendant in Error against Whitcomb after a full and fair trial before a Jury, and after all the contentions available to him and raised by his counsel had been passed upon adversely by the Circuit Court of Appeals and the judgment in favor of the Defendant in Error affirmed.

Immediately upon the affirmance by the Circuit Court of Appeals an action in Equity was begun by Whitcomb to restrain the enforcement of the judgment, and a temporary injunction was sought by him to prevent the enforcement thereof.

The motion for an injunction was heard and carefully considered by *Judge Hand* and an opinion was written disposing absolutely of the contentions made.

The same questions also were presented to *Circuit Judge Lacombe* on a motion made by the defendant for

judgment dismissing the complaint, and were decided by him in the same manner as by *Judge Hand* and upon the same grounds.

Not satisfied with a review by the Circuit Court of Appeals and by decisions by two learned and able Judges, an action in Equity was begun by the Plaintiff in Error in the present action raising precisely the same questions as in the action in Equity begun by Whitcomb, with an additional ground that the District Court was without jurisdiction to enforce liability. The bill was so obviously without merit that on motion *Judge Lacombe* directed judgment dismissing it.

The Plaintiff in Error having no defense on the merits thereupon sought further delay by interposing a demurrer to the complaint in the present action, raising the sole question of the jurisdiction of the Court, although that question had been presented to and decided adversely by *Judge Lacombe* in the action in Equity brought by the Plaintiff in Error to restrain the enforcement of liability on its bond.

Although the breach of the contract entered into occurred as early as January, 1910, and although an action to enforce damages for the breach was begun on April 30th, 1912, and a judgment obtained in favor of the plaintiff therein on June 14th, 1913, and was affirmed by the Circuit Court of Appeals and its mandate handed down on July 1st, 1914, the Defendant in Error by the interposition of the frivolous demurrer in the present action has been prevented from receiving his just due.

While no complaint is made as to the right of Whitcomb to a full and fair trial and to a full and fair review of the judgment rendered against him by the Circuit Court of Appeals, both of which he has had, complaint is made of the making use by him and his surety of the forms of law, coupled with their ability to give bonds to stay execution against them, to prevent the payment of their just debts and obligations.

It would seem that this case is eminently one where a Writ of Error has been sued out to delay the proceedings on the judgment of an inferior Court, and which has had that

direct effect and that under Rule 23 of this Court damages at the rate of 10% should be awarded on the amount of the judgment recovered.

Respectfully submitted,

KELLOGG & ROSE,
Attorneys for Defendant in Error.

ABRAM J. ROSE,
Of Counsel.

Opinion, Ward, J.

UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

JAMES A. WHITCOMB,

vs.

GEORGE S. SHULTZ.

Defore:

LACOMBE, WARD & ROGERS, *JJ.*

WARD, *J.*

The Great American Automatic Vending Machine Company, plaintiff's assignor, agreed to manufacture for the Robertson Sales Company 10,000 vending machines like a model submitted. The defendant Whitcomb became surety for the faithful performance of the contract by the Sales Company. By January 1, 1910, the Vending Company had delivered 2100 machines, after which date the Sales Company refused to receive any more. Thereupon the plaintiff brought this action at law against the defendant as surety, to recover the damages sustained by the Vending

Company, being first, the balance due unpaid upon the 2100 machines delivered, with interest at six per cent.; second, the cost of materials purchased for the manufacture of the 10,000 machines, less what was used in the 2100 delivered; third, the profits on the 7900 machines remaining to be delivered. The jury returned a verdict for the plaintiff. This is a writ of error to a judgment entered thereon.

Many errors are assigned because of Judge Mack's refusal to charge as requested, but we think that his charge was full, careful and impartial and properly covered the requests.

The defendant relies greatly on the proposition that the plaintiff did not manufacture the machines because it employed other parties to make many of the parts and therefore has no cause of action. The Court rightly charged the jury that the plaintiff's assignor was not obliged itself to manufacture all the parts. There was evidence that the model submitted was manufactured in the same way and that the officers of the Sales Company knew before they repudiated the contract that the Vending Company was itself making only some parts of the machine, employing third parties to make other parts.

The material question was whether the Vending Company manufactured machines substantially like the model. If it did, it performed its contract. It was not responsible for the operation of the machines. This question was fully and fairly presented to the jury, who decided it in the plaintiff's favor upon a conflict of testimony and this finding is binding upon us.

The defendant also contends that the plaintiff failed to perform the contract because it did not keep in its possession the dies, patterns, etc., so as to be able to conform to the requirement of the contract that it should deliver the same to the Sales Company upon its demand in first class condition upon the completion of the contract. This is a quite immaterial consideration, because the contract never was completed, having been repudiated by the Sales Company after 2100 machines had been delivered.

The trial occupied nearly three weeks and the defendant took a multitude of hypercritical exceptions to the proof

of damage offered by the plaintiff. The unpaid balance due upon the machines actually delivered was a mere question of mathematics. In respect to the cost of material ordered by the plaintiff's assignor, there was primary proof, confirmed by the receipted bills of the vendors and the plaintiff's checks in payment thereof. Finally, there was evidence as to the cost of making the machines as compared with the price the plaintiff was to receive, showing the loss of profits. There was sufficient competent evidence to enable the jury to determine the amount of the plaintiff's damages with reasonable certainty and we are not disposed to be astute to discover and discuss errors in this long trial which in our opinion were harmless. The judgment is affirmed.

Opinion, Hand, J.

UNITED STATES DISTRICT COURT,
SOUTHRN DISTRICT OF NEW YORK.

JAMES A. WHITCOMB,

against

GEORGE S. SHULTZ.

HAND, *D. J.:*

The theory of the bill is this: The Machine Company in order to procure the contract represented that they had themselves all the mechanical and industrial means for making the whole machines in their shops, and that they meant to make them there. In fact, unknown to the plaintiff, they had no such facilities and never did make them in the shops nor did they ever intend to do so. This was a fraud which justifies the cancellation of the contract.

There is a very simple and conclusive answer to this reasoning, that is, that as the contract entered into did not require the Machine Company to build the machines in their shops, but only to deliver machines made like the model,

the fact is quite immaterial that they could not have done them in their shops. It has now been finally and authoritatively adjudicated between the parties in the action at law that the contract has the interpretation which I have just mentioned and that puts an end to the case. Fraud must touch some matter material to the action of the injured party; it must be a statement about facts whose truth would have kept the victim away from his injury. If the injury of which he complains is entering into a contract, as here, then it must appear that knowledge of the facts would have resulted in his refusing the contract. If the contract allowed the Machine Company to manufacture anywhere, it is impossible to see how knowledge of the fact that they must manufacture out of their shops, could be material. If the contract was as Whitcomb contended upon the trial of the action at law, a contract to manufacture in the Machine Company's shops only, then the false statements would have constituted fraud, and to manufacture out of the shop would have been insufficient performance.

Of course, a contract may through fraud fail to represent the true intent of the parties and may be reformed for that reason, but no such question is raised here. The plaintiff obviously could not now take that position, and we must suppose that the contract correctly embodied the purpose of the parties to allow the machines to be made anywhere and assembled by the Machine Company. It may perhaps be still further argued, that, although the contract allowed the machines to be made elsewhere, the assurances of the Machine Company gave the plaintiff to suppose that they would in fact be made in the shop. Such an assurance can hardly be the basis of any right when accompanied by a formal undertaking which imposes different obligations, but even if we should assume that it might be the basis of an action for deceit or upon a collateral contract, at least it is absurd to talk about it as a fraud which resulted in the execution of this contract.

If these facts could constitute any such fraud, they would have been a good defense in the action at law because they would have shown that the Machine Company had not substantially performed. They were unsuccessful in that

action because the contract was more liberally interpreted, and the same interpretation makes it quite impossible to urge that there was any fraud which justifies cancelling the contract. That the court put this construction upon the contract the record abundantly proves. My reliance is upon the judge's charge, and especially upon that part contained between folio 1778 and folio 1790. Here it appears that the only material question left to the jury was whether the machines when made corresponded with the Plumb model; if so, it made no difference where the parts were made. "I find nothing in this contract to justify a claim that the Machine Company itself had to manufacture all of the parts and all dies, patterns and special tools personally and had to manufacture all those dies, patterns and special tools, for each and every distinct part" (fol. 1780).

The motion is denied. I will give no stay pending an appeal, unless the plaintiff can show me that Shultz is not responsible, nor then either, if the Machine Company will agree to pay any judgment against Shultz, unless the Machine Company is also shown to be irresponsible. In those cases I may consider that question.

July 18, 1914.

LEARNED HAND.

D. J.

Memorandum, Lacombe, J.

Indorsed on the Notice of Motion for judgment on Pleadings.

"I concur fully with Judge Hand's opinion; the motion is granted.

Aug. 4, '14.

E. H. LACOMBE,
U. S. Cir. J."

Whitcomb *v.* Shultz—Equity 11-288.

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OCTOBER TERM, 1914

No. 643

AMERICAN SURETY COMPANY OF NEW YORK
Plaintiff-in-Error
(Defendant below)

against

GEORGE S. SHULTZ
Defendant-in-Error
(Plaintiff below)

(IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK)

BRIEF ON BEHALF OF DEFENDANT IN ERROR

ABRAM J. ROSE
ALFRED C. PETTÉ
PHILIP M. BRETT
Counsel for Defendant-in-Error

Lapiante & Dunklin Printing Co., 36 South William St., New York

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 643.

AMERICAN SURETY COMPANY OF NEW YORK,
Plaintiff-in-Error,
(Defendant below),

against

GEORGE S. SHULTZ,
Defendant-in-Error,
(Plaintiff below).

In Error to the District Court of the United States for the Southern District of New York.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement.

This case comes before this Court on writ of error and certificate of the question of jurisdiction to review a judgment in favor of George S. Shultz (plaintiff below), against the American Surety Company of New York (defendant below), for the sum of $26,972.68, entered upon an order made by DISTRICT JUDGE JOHN R. HAZEL at a TERM of the UNITED STATES DISTRICT COURT for the SOUTHERN DISTRICT OF NEW YORK overruling the demurrer interposed by the defendant

to the complaint, and directing judgment in the plaintiff's favor upon the pleadings.

See Writ of Error, p. 1, fols. 1-2.
See Certificate as to Jurisdiction, pp. 8-10, fols. 15-18.
See Order for Judgment, pp. 7-8, fol. 14.
See Judgment, p. 8, fol. 15.

Facts.

The judgment in favor of Shultz against Whitcomb, to secure a stay of the enforcement of which pending the review by the Circuit Court of Appeals the bond in question was given, grew out of a contract entered into between the Robertson Sales Company, a New Jersey corporation, and the Great American Automatic Vending Machine Company, also a New Jersey corporation, for the manufacture by the Machine Company of ten thousand vending machines under patents pending of the Sales Company "like to the model" deposited by the Sales Company (except as to certain alterations specified in the agreement), including all dies, patterns, special tools, etc., necessary for the manufacture of said machines, for the sum of $46,000.

In consideration of the making of the contract and of the sum of $1.00 paid by the Machine Company, Whitcomb executed a written guaranty to the effect that the Sales Company would faithfully perform and fulfill the contract on its part.

The Machine Company proceeded in the performance of the contract and continued therein until January 1st, 1910, at which time 2100 machines had been manufactured and delivered. On that date the Sales Company refused absolutely to accept further deliveries under the contract and wholly repudiated the same for the reason, as claimed, that a large number of machines would not work and were worthless.

After the repudiation of the contract an action was commenced in the Supreme Court of the State of New York

by Shultz, as the assignee of the Machine Company, against Whitcomb on his guaranty of the contract to recover damages for said breach, which action, upon the application of Whitcomb, was removed to the United States Circuit Court for the Southern District of New York on the ground of the diverse citizenship of the parties, Shultz being a citizen of the State of New York and Whitcomb being a citizen of the State of Oklahoma.

The action came on for trial before the Hon. Julian W. Mack and a jury at a Term of the District Court (the Circuit Court in the meantime having been abolished), which trial lasted for a period of nearly three weeks. The jury returned a verdict in favor of Shultz for the sum of $24,607.95, upon which verdict judgment was entered for the sum of $25,106.50 damages and costs.

A writ of error was sued out by Whitcomb to review said judgment by the Circuit Court of Appeals for the Second Circuit, and to stay the execution thereof pending the hearing, the supersedeas bond sued upon in this action was given. After due hearing the judgment was affirmed by the Circuit Court of Appeals.

On the trial before Judge Mack, and also on the appeal to the Circuit Court of Appeals, the principal contention by Whitcomb was that the machines manufactured were not like the model deposited, and also that the Machine Company violated the contract by purchasing some of the parts from independent dealers and supply houses instead of manufacturing itself all the various parts of the machines, and by allowing the dies, patterns, etc., to leave its possession during performance to enable other dealers to furnish some of the necessary parts.

That the machines manufactured were exactly like the model deposited was expressly found by the jury on the trial before Judge Mack, and the contention that the Machine Company was itself obliged to manufacture all the various parts was overruled both by the learned Trial Judge and by the Circuit Court of Appeals on the ground that the obligations of the Machine Company were per-

formed if the machines were manufactured like the model deposited.

See Opinion, CIRCUIT COURT OF APPEALS, WARD, *J.* (annexed hereto).

After the affirmance by the CIRCUIT COURT OF APPEALS, an action in equity was begun by Whitcomb to restrain the enforcement of the judgment on the ground that the contract had been induced by fraudulent representations by the Machine Company as to its experience in and its facilities for the manufacture of vending machines, which defense, being an equitable defense, it was claimed he was precluded from interposing in the action at law.

An order to show cause why an injunction *pendente lite* should not issue was granted by DISTRICT JUDGE LEARNED HAND, together with a restraining order staying all proceedings for the enforcement of the judgment until the hearing and decision of the motion.

On the return of the order to show cause JUDGE HAND denied the motion and vacated the restraining order on the ground that it having been decided by the CIRCUIT COURT OF APPEALS that the Machine Company was not obliged to manufacture all of the various parts itself and that its obligations were fulfilled by the manufacture of machines like the model submitted, any alleged misrepresentations as to the experience and facilities of the Machine Company were as to entirely immaterial and irrelevant facts and afforded no ground whatsoever for the equitable interference of the Court.

See Opinion, HAND, *J.*, annexed hereto.

Upon the denial of the motion for a temporary injunction, Shultz moved under EQUITY RULE XXIX for judgment on the pleadings, which motion came on for hearing before CIRCUIT JUDGE LACOMBE, who granted the same and directed judgment dismissing the complaint, the learned Judge stating in a memorandum handed down that he fully concurred with JUDGE HAND'S opinion.

See Memorandum, LACOMBE, *J.*, annexed hereto.

From the judgment entered an appeal was taken by Whitcomb to the CIRCUIT COURT OF APPEALS, which appeal has been argued, but at the time of the writing of this brief, has not yet been decided.

Thereupon the present action was begun by Shultz against the American Surety Company as surety on the supersedeas bond referred to.

Upon the commencement thereof an action in equity was begun by the Surety Company against Shultz to restrain the prosecution of this action, alleging the same facts as were alleged in the equity action brought by Whitcomb, and further averring that the DISTRICT COURT was without jurisdiction to entertain the present suit because there was no diversity of citizenship alleged.

A motion was made by Shultz for judgment on the pleadings in that action also, on the ground that the facts therein alleged, as in the action brought by Whitcomb, did not constitute a cause of action in equity. This motion also came on for hearing before CIRCUIT JUDGE LACOMBE and the complaint was dismissed. From the judgment entered an appeal was taken by the Surety Company to the CIRCUIT COURT OF APPEALS, which appeal has been argued but has not yet been decided.

In addition to the proceedings above mentioned an action was brought and is still pending in the SUPREME COURT OF THE STATE OF NEW YORK by the Sales Company against the Machine Company to recover the sum of $4,914.36, the amount of payments made by the Sales Company under the contract for the manufacture of the vending machines, based on the same alleged misrepresentations set out in the two equity actions begun by Whitcomb and the American Surety Company, and on the further ground that the machines manufactured were not like the model deposited.

An action also was commenced by the Sales Company against the Machine Company, which also is pending, in the SUPREME COURT of the STATE OF NEW JERSEY for the identical relief and on the identical grounds made the basis of the New York action last mentioned.

Both of these last two actions are therefore based on the identical claim made in the original action: that the machines manufactured were not like the model, and which question of fact was decided adversely to that contention by the jury on the trial before JUDGE MACK; and on the identical alleged misrepresentations made the basis of the equity suits brought by Whitcomb and Shultz and overruled by both JUDGE LACOMBE and JUDGE HAND.

Thus, out of the original controversy no less than six independent actions and four appeals have arisen, viz.:

(A) An action at law brought by Shultz against Whitcomb to recover damages for the breach of the contract, and which, after a trial lasting three weeks before the Court and a jury, was decided in Shultz's favor.

(B) An action in equity brought by Whitcomb against Shultz to restrain the enforcement of the judgment in the original action, and which, on summary motion for judgment on the pleadings, was decided in Shultz's favor.

(C) An action at law brought by Shultz against the American Surety Company upon the supersedeas bond staying the enforcement of the judgment in the original action pending review by the Circuit Court of Appeals, and which, on summary motion for judgment on the pleadings, was also decided in Shultz's favor.

(D) An action in equity by the American Surety Company against Shultz to restrain the action on the supersedeas bond referred to, and which, on summary motion for judgment on the pleadings, was decided in Shultz's favor.

(E) An action at law by the Sales Company against the Machine Company to recover amounts paid for work done under the contract for the manufacture of the vending machines, based on the identical facts and involving identical questions of law with those decided in Shultz's favor in the various proceedings above referred to.

(F) An action at law by the Sales Company against the Machine Company in the State of New Jersey to recover

such payments, based on the same facts and on the same questions involved in the action brought in the Supreme Court of the State of New York.

(G) An appeal by Whitcomb to the Circuit Court of Appeals from the judgment rendered against him in the original action, which appeal, by the unanimous decision of the Court, was decided in Shultz's favor.

(H) An appeal by Whitcomb to the Circuit Court of Appeals from the judgment rendered against him in the equity action brought to restrain the enforcement of the judgment in the original action, which appeal has been argued but not yet decided.

(I) An appeal by the American Surety Company to the Circuit Court of Appeals from the judgment dismissing the complaint in the action brought by it to restrain the enforcement of the judgment on the supersedeas bond, which appeal also has been argued but not yet decided.

(J) An appeal by the American Surety Company to this Court in the present action.

These various proceedings have been referred to for the purpose of informing this Court of the vexatious and harassing tactics pursued by Whitcomb and his surety to avoid the payment of the judgment rendered against him in the original suit.

That the litigation instituted is purely for the purpose of delay and without any real merit is plain from the fact that in three of the actions the complaints made or the pleas interposed have been held on their face to be frivolous and summary judgment has been awarded on motion, and in the two actions remaining untried the same questions of fact and law are involved as were decided adversely to Whitcomb's contentions in the original suit.

Assignment of Errors.

The sole question before this Court is one of the jurisdiction of the District Court to entertain this action and

render judgment therein, and is stated in the certificate signed by JUDGE HAZEL as follows:

> "Has the District Court of the United States for "the Southern District of New York jurisdiction of a "plenary action at law commenced by original process "by a citizen of the State of New York against a cor- "poration organized under the laws of said State to "recover the sum of $25,106.50 exclusive of interest and "costs upon a bond or undertaking executed by said "corporation as surety and filed in the office of the "Clerk of said Court for the purpose of procuring a "supersedeas and stay of execution upon a writ of "error to a judgment rendered in said Court in favor "of the obligee and against the party who executed "said bond as principal, which judgment so superseded "and stayed had been entered in a plenary action at "law brought by said obligee against said principal in "the Supreme Court of the State of New York and by "said principal removed to said United States Court "for the Southern District of New York; (the said "surety not being a party to said action) it appearing "that no question is raised by either party as to the "validity or meaning of the bond or undertaking or "of the statute or rule of Court pursuant to which the "same was given?"

See Certificate of Question of Jurisdiction, p. 9, fols. 17-18.

See Assignment of Errors, p. 10, fol. 19.

POINT I.

The action being one to enforce liability on a supersedeas bond given to procure a stay of execution on a judgment rendered in an action in the District Court, pending a review on error by the Circuit Court of Appeals, it is an action arising under the Laws of the United States of which a United States Court has jurisdiction, irrespective of the citizenship of the parties.

FIRST: By the Judicial Code (Act of March 3rd, 1911) it is provided:

> "SECTION 24. The District Court shall have original jurisdiction as follows:
>
> "1. Of all suits of a civil nature at common law "or in equity * * * * where the matter in controversy "exceeds, exclusive of interest and costs, the sum or "value of Three thousand dollars, and (a) ARISES UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES "OR TREATIES MADE, OR WHICH SHALL BE MADE, UNDER "THEIR AUTHORITY * * * **;"

This language is brought from and is identical with the previous Act defining the jurisdiction of the Circuit Courts.

See Act of March 3rd, 1875, Chapter 137; 18 Statutes at Large, 470.

SECOND: **An action on a supersedeas bond given pursuant to a Federal Statute is an action arising under the Laws of the United States within the meaning of the section referred to.**

1st. BY SECTIONS 1000 AND 1007 OF THE REVISED STATUTES, SPECIFIC PROVISION IS MADE FOR THE GIVING OF A BOND TO OPERATE AS A SUPERSEDEAS.

SECTION 1000 PROVIDES:

> "Every justice or judge signing a citation on any "writ of error shall, except in cases brought up by the

"United States or by direction of any department of "the Government, take good and sufficient security "that the plaintiff in error or appellant shall prosecute "his writ or appeal to effect, and if he fail to make his "plea good, shall answer all damages and costs where "the writ is a supersedeas and stays execution, or all "costs only where it is not a supersedeas as afore-"said."

SECTION 1007 PROVIDES:

"In any case where a writ may be a supersedeas, "the defendant may obtain such supersedeas by serv-"ing the writ of error or by lodging a copy thereof for "the adverse party in the clerk's office where the "record remains within sixty days (Sundays exclu-"sive) after the rendering of the judgment complained "of, and giving the security required by law on the "issuing of the citation. But if he desires to stay pro-"cess on the judgment, he may, having served his writ "of error as aforesaid, give the security required by "law within sixty days after the rendition of such judg-"ment or award with the permission of a justice or "judge of the appellate court. And in such cases "where a writ of error may be a supersedeas, execution "shall not issue until the expiration of ten days."

RULE XIII OF THE CIRCUIT COURT OF APPEALS PROVIDES:

"1. Supersedeas bonds in the circuit and district "courts must be taken with good and sufficient security "that the plaintiff in error or appellant shall prosecute "his writ or appeal to effect and answer all damages "and costs if he fail to make his plea good. Such "indemnity where the judgment or decree is for the "recovery of money not otherwise secured must be "for the whole amount of the judgment or decree, in-"cluding just damages for delay and costs and interest "on the appeal; but in all suits where the property in "controversy necessarily follows the suit, as in real "actions and replevin, and in suits on mortgages, or "where the property is in the custody of the marshal "under admiralty process, or where the proceeds "thereof or a bond for the value thereof is in the "custody of the court, indemnity in all such cases will "be only in an amount sufficient to secure the sum re-"covered for the use and detention of the property, and

"the costs of the suit and just damages for delay and "costs and interest on the appeal.

"2. On all appeals from an interlocutory order or "decree granting or continuing an injunction in a "circuit or district court, the appellant shall at the "time of the allowance of said appeal file with the clerk "of such circuit or district court a bond to the opposite "party in such sum as such court shall direct, to answer "all costs if he shall fail to sustain his appeal."

See Rule XIII, Circuit Court of Appeals, 150 Fed. Rep., XXVIII.

Thus, express provision is made for the giving of supersedeas bonds and the conditions thereof and liabilities thereunder, by the sections and the rule referred to.

2nd. AN ACTION ON SUCH A BOND IS ONE ARISING UNDER THE LAWS OF THE UNITED STATES OF WHICH THE DISTRICT COURT HAS JURISDICTION, IRRESPECTIVE OF THE CITIZENSHIP OF THE PARTIES.

Seymour *vs.* Phillips & Colby Construction Co., 7 Biss., 460; Federal Cases No. 12,689;

Crane *vs.* Buckley, 105 Fed. Rep., 401;

Egan *vs.* Chicago Great Western Ry. Co., 163 Fed. Rep., 344.

In SEYMOUR *vs.* PHILLIPS & COLBY CONSTRUCTION CO. (*supra*), the precise question was presented and decided in favor of the jurisdiction. In that case the plaintiffs recovered a judgment in the Circuit Court for the Northern District of Illinois against the defendant, who thereupon sued out a writ of error to this Court (as was then permissible) and gave a supersedeas bond. The writ of error was dismissed and a suit was brought upon the bond. A plea in abatement was put in alleging that all the plaintiffs and all the defendants were citizens of the State of Illinois, and that the Circuit Court in which the action was brought had no jurisdiction of the case.

CIRCUIT JUDGE DRUMMOND, holding that the action was

one arising under the Laws of the United States, of which a Federal Court had jurisdiction, irrespective of the citizenship of the parties, said:

> "The first section of the act of the 3rd of March, "1875 (18 Stat. 470), which we have had occasion "so often to examine since it was passed, declares "that 'circuit courts of the United States shall have " 'original cognizance concurrently with the courts of " 'the several states, of all suits of a civil nature at " 'common law or in equity, where the matter in dis- " 'pute exceeds, exclusive of costs, the sum or value of " 'five hundred dollars, and arising under the constitu- " 'tion or laws of the United States.' Now, IS THIS NOT "A MATTER IN DISPUTE ARISING UNDER THE LAWS OF THE "UNITED STATES, AS IT IS PRESENTED UPON THE FACE OF "PLEADINGS? IT IS AN INDEMNITY GIVEN IN PURSUANCE "OF A LAW OF THE UNITED STATES; THE MEASURE OF THE "LIABILITY OF THE PARTY, AND THE RIGHTS BOTH OF THE "PLAINTIFFS AND THE DEFENDANTS, DEPEND UPON A LAW OF "THE UNITED STATES, AND A RULE OF THE SUPREME COURT "OF THE UNITED STATES. IT IS IMPOSSIBLE TO TAKE A STEP "IN THE PROGRESS OF THE CAUSE IN ORDER TO DETERMINE "THE RIGHTS OF THE PARTIES, WITHOUT LOOKING AT THE "LAW AND THE RULE AS THE GUIDE OF THE COURT, AND CON- "TROLLING ITS JUDGMENT IN THE DETERMINATION OF THE "CASE."
>
> Seymour *vs.* Phillips & Colby Construction Co. (*supra*).

In CRANE *vs.* BUCKLEY (*supra*), an action was brought in the Superior Court of the State of California to recover on a supersedeas bond given on an appeal from a decree of the Circuit Court for the Southern District of California to the Circuit Court of Appeals, which Court affirmed the judgment. Upon the petition of the defendants the suit was removed from the State Court to the Circuit Court for the Northern District of California upon an allegation that the determination of the surety's liability depended upon the construction of an Act of Congress, namely; Section 1000 of the Revised Statutes. The plaintiff moved to remand the case to the State Court and contended that the defendants' liability arose exclusively under their own contract as contained in the supersedeas bond, and that the de-

termination of such liability was not dependent upon the construction of any United States Law.

CIRCUIT JUDGE MORROW, denying the motion to remand, said:

> "The action under consideration is based upon pro-
> "ceedings in the United States Circuit Court acting
> "under authority conferred by a law of the United
> "States and a rule of the circuit court of appeals (No.
> "13). 31 C. C. A. CLIII, 90 Fed. CLIII. IT THEREFORE
> "PRESENTS A QUESTION ARISING UNDER THE LAWS OF THE
> "UNITED STATES, AND SO WITHIN THE JURISDICTION OF
> "THIS COURT."

Crane *vs.* Buckley (*supra*).

In EGAN *vs.* CHICAGO GREAT WESTERN RY. CO. (*supra*), a judgment for the recovery of money was rendered by a Circuit Court of the United States in Iowa in an action at law, and a writ of error was sued out to review said judgment by the Circuit Court of Appeals, and a proceeding by motion was commenced in the Circuit Court for the Northern District of Iowa to enforce liability on a supersedeas bond given to stay the judgment pending the review. No diversity of citizenship was shown. No question was raised as to the jurisdiction of the Court to enforce liability on the bond, but it was claimed that it must be by action and not by summary process. The Statutes of Iowa provided for the enforcement of an appeal bond upon motion if the damages could be accurately known without an issue and a trial.

It was held that the practice obtaining under the State law was applicable to a supersedeas bond given in a Federal Court sitting in that District, and that the liability of the sureties could properly be enforced by motion and order of a Federal Court.

Egan *vs.* Chicago Great Western Ry. Co. (*supra*).

Thus, in the three cases referred to, the jurisdiction of a Federal Court to enforce a supersedeas bond given in a Federal suit was expressly upheld; in two of which the right to entertain jurisdiction was expressly challenged on the ground that no diversity of citizenship was shown, and

in the third, while conceding the jurisdiction of the Court, the right to enforce such a bond by summary process in accordance with the State law prevailing, was denied, but upheld.

3rd. IN ANALOGY TO THESE DECISIONS ARE NUMEROUS DECISIONS IN ACTIONS ON BONDS, OTHER THAN SUPERSEDEAS BONDS, GIVEN UNDER FEDERAL STATUTES, *i. e.:*

(A) *An action on a bond given by a United States marshal for the faithful performance of his duties.*

Bock *vs.* Perkins, 139 U. S., 628;
Bachrack *vs.* Norton, 132 U. S., 337;
Feibelman *vs.* Packard, 109 U. S., 421;
Lawrence *vs.* Norton, 13 Fed. Rep., 1;
United States *vs.* Davidson, 1 Biss., 432; Fed. Cas. No. 14,921;
Adler *vs.* Newcomb, 2 Dillon, 45; Fed. Cas. No. 83.

In FEIBELMAN *vs.* PACKARD (*supra*), this Court upheld the jurisdiction of the Circuit Court to entertain an action on the official bond of a marshal and his sureties as one arising under a Law of the United States, and which might, therefore, be removed from a State to a Circuit Court.

MR. JUSTICE MATTHEWS said:

> "It is clear that the Circuit Court did not err in "directing the removal of the suit from the State Court; "for if we look at the nature of the plaintiff's cause of "action and the grounds of the defense as set forth "in his petition, it is apparent that the suit arose un- "der a law of the United States."

And in answer to the contention of counsel that the suit was to recover damages for the alleged trespass, the learned Justice said:

> "It was plaintiy upon the bond itself and, there- "fore, arose directly under the provisions of an Act of "Congress."

Feibelman *vs.* Packard (*supra*).

In BACHRACK *vs.* NORTON (*supra*), MR. JUSTICE BRADLEY, writing, said:

> "This is an action on a marshal's bond against "him and his sureties to recover damages for his "wrongful taking of the goods of the plaintiff under "an attachment issued out of the Circuit Court of the "United States for the Northern District of Texas "against one Myerson. According to the decision in "Feibelman *vs.* Packard, 109 U. S., 421, it is a case "arising under the Laws of the United States, and is "therefore within the jurisdiction of the Circuit Court "without any averment of citizenship of the parties."

Bachrack *vs.* Norton (*supra*).

And in BOCK *vs.* PERKINS (*supra*), MR. JUSTICE HARLAN, delivering the opinion, said:

> "A case, therefore, depending upon the inquiry "whether a marshal or his deputy has rightfully exe- "cuted a lawful precept directed to the former from a "Court of the United States is one arising under the "laws of the United States; for, as this Court has "said: 'Cases arising under the laws of the United "'States are such as grow out of the legislation of "'Congress, whether they constitute the right or privi- "'lege, or claim or protection, or defense of the party, "'in whole or in part, by whom they are asserted.' "* * * * * If the goods in question, when seized, were "the property of Lane, the marshal and his deputies "were in the discharge of duties imposed upon them "by the laws of the United States; and for any failure "in that regard he would be liable to suit by any one "thereby injured. Rev. Stat. §784. This case was "therefore one arising under the laws of the United "States, and removable from the state court."

Bock *vs.* Perkins (*supra*).

(B) *Likewise an action on a bond given by a contractor for the performance of public work.*

Mullin *vs.* United States, 109 Fed. Rep., 817; United States *vs.* Axman, 152 Fed. Rep., 816.

In UNITED STATES *vs.* AXMAN (*supra*), the opinion states:

> "The present statute confers rights which are special and dependent upon the law itself. It is a law "of the United States under which this suit was "brought, under which it is maintained, under which "judgment is to be entered. There cannot be a judgment entered in the case in favor of persons supplying the material and labor except upon this statute. "I therefore hold the jurisdiction in this case is to be "sustained as a suit arising under a law of the United "States."

United States *vs.* Axman (*supra*).

(C) *Also an action upon a bond given by a Clerk of a Court of the United States.*

Howard *vs.* United States, 184 U. S., 676.

MR. JUSTICE HARLAN, in that case, said:

> "But does it not appear from the petition itself "that the case was one of which the circuit court could "take cognizance independently of the citizenship of "the real parties in interest? This question must receive an affirmative answer. The suit was directly "upon a bond taken by the circuit court in conformity "with the statutes of the United States, and the case "depends upon the scope and effect of that bond and "the meaning of those statutes. It was therefore a "suit arising under the laws of the United States, of "which the circuit court (concurrently with the courts "of the state) was entitled to take original cognizance, "even if the parties had been citizens of the same "state."

Howard *vs.* United States (*supra*).

(D) *Also an action on the official bond of a cashier of a national bank.*

Walker *vs.* Windsor National Bank, 56 Fed. Rep., 76.

(E) *Also an action on an attachment bond executed in a suit pending in a Federal Court.*

Files *vs.* Davis, 118 Fed. Rep., 465.

In the opinion in that case it was said:

"In the case at bar the construction and applica-
"tion of Section 915 of the Revised Statutes and the
"rules of this Court adjudging the attachment laws
"of the State of Arkansas are directly involved * * *
"This action is therefore clearly one arising under the
"laws of the United States, and as the amount involved
"exceeds Two thousand dollars, exclusive of interest
"and costs, it is within the jurisdiction of this Court."

Files *vs.* Davis (*supra*).

(F) *And likewise an action on a bond given as a condition of the granting of a temporary injunction in an action brought in a Federal Court.*

Tullock *vs.* Mulvane, 184 U. S., 497;
Leslie *vs.* Brown, 90 Fed. Rep., 171;
Mississippi Valley Fuel Co. *vs.* Watson Coal Co., 202 Fed. Rep., 122;
St. Louis I., M. & S. Ry. Co. *vs.* Bellamy, 211 Fed. Rep., 172.

In TULLOCK *vs.* MULVANE (*supra*), MR. JUSTICE WHITE, writing, said:

"It may not, we think, be doubted that a bond for
"injunction in an equity court of the United States
"given under the order of such court is a bond executed
"in and by virtue 'of an authority exercised under the
" 'United States.' Rev. Stat. §709. Certainly, the courts
"of the United States derive all their powers from the
"Constitution and Laws of the United States, and their
"authority is therefore exercised thereunder. Being,
"then, an obligation entered into by virtue of such
"authority, the conclusion cannot be escaped that the
"defense specially set up, that no liability on the bond
"could arise until the court of the United States in
"which the controversy was pending had finally de-

"termined that the injunction should not have been "granted, was the assertion of an immunity from lia- "bility depending on an authority exercised under the "United States, and therefore necessarily involved the "decision of a Federal question."

Tullock *vs.* Mulvane (*supra*).

In LESLIE *vs.* BROWN (*supra*), CIRCUIT JUDGE TAFT, writing for the Circuit Court of Appeals, Sixth Circuit, (TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge), said:

"We have no doubt that an action at law in the "federal court may be brought on such a bond, pro- "vided the necessary amount is involved, on the ground "that the plaintiff is enforcing rights secured to him "under the constitution and laws of the United States."

Leslie *vs.* Brown (*supra*).

The present action is, therefore, clearly a suit arising under the Laws of the United States of which the District Court had jurisdiction wholly irrespective of the citizenship of the parties.

POINT II.

Moreover, this action is but an offshoot of, and ancillary and incidental to, the original suit in which the bond was given, and on that ground too the jurisdiction of the District Court may be sustained.

That an action on a bond given in a suit pending in a Federal Court is not an original suit, but ancillary and incidental to the action in which the bond was given, and that a Federal Court has jurisdiction of a suit thereon, irre-

spective of the citizenship of the parties, was expressly decided in the following cases:

Seymour *vs.* Phillips & Colby Construction Co., 7 Biss., 460; Fed. Cas. No. 12,689;
Arnold *vs.* Frost, 9 Benedict, 267; Fed. Cas. No. 558;
Lamb *vs.* Ewing, 54 Fed. Rep., 268;
Crane *vs.* Buckley, 105 Fed. Rep., 401.

In SEYMOUR *vs.* PHILLIPS & COLBY CONSTRUCTION CO. (*supra*), this ground of the jurisdiction of the Court was stated by CIRCUIT JUDGE DRUMMOND in the following language:

> "It is a controversy springing out of a suit already "determined in the Federal Court. It is in one sense "an offshoot of that suit. It would seem upon principle "that this is the proper forum to settle all controversies "growing out of that suit."
>
> Seymour *vs.* Phillips & Colby Construction Co. (*supra*).

In ARNOLD *vs.* FROST (*supra*) an appeal was taken to the Circuit Court from a decree in equity rendered by the District Court under the practice then prevailing. On such appeal a supersedeas bond was given. The Circuit Court affirmed the decree with costs to the appellees. Suit was brought on the bond in the District Court, and among other defenses set up was one that the Court had no jurisdiction of the suit. DISTRICT JUDGE BLATCHFORD, holding that the Court had jurisdiction, said:

> "It is not an original suit, but is an offshoot or "out-branch of the suit in which the bond was given, "and jurisdiction of that suit gives jurisdiction of "the subject matter of this suit, the defendants having "been served with process in this suit. Jones *vs.* An- "drews, 10 Wall., 327; Christmas *vs.* Russell, 14 Wall., "69 Bobbyshall *vs.* Oppenheimer, Case No. 1,592; "Hatch *vs.* Dorr, id., 6,206; Gwin *vs.* Breedlove, 2 How., "29; Dunn *vs.* Clarke, 8 Peters, 1."
>
> Arnold *vs.* Frost (*supra*).

In LAMB *vs.* EWING (*supra*), on the expiration of a stay bond given in an action pending in a Federal Court, the lands of the surety thereon were sold on execution to satisfy the judgment, but in view of a threatened appeal by the surety, the judgment-creditor was required, as a prerequisite to obtaining the money, to give a bond conditioned for re-payment thereof in case the order confirming the sale was reversed. No appeal, however, was taken, but the purchaser of the land brought ejectment against the stay bondsman and the sale was held to be void. Thereupon the Court ordered the judgment-creditor to re-pay the money into Court, and assigned the re-delivery bond to the purchaser of the land. The order was not complied with and the purchaser brought an action on the bond in the CIRCUIT COURT FOR THE DISTRICT OF NEBRASKA, the same Court in which the original action was commenced.

It was held that the action on the bond was merely auxiliary to the former suit, and that the CIRCUIT COURT had jurisdiction irrespective of the citizenship of the parties or the amount in controversy. DISTRICT JUDGE SHIRAS, writing for the CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, said:

> "The facts shown in the record, however, prove be-
> "yond question that this proceeding is one ancillary
> "to the original action of Charles W. Seymore and
> "William W. Wardell *v.* William P. Young, and the
> "jurisdiction of the court over that case, which is un-
> "questioned, supports the jurisdiction over the pro-
> "ceedings subsequently brought upon the bond given
> "under the circumstances hereinbefore stated. The
> "rule is well settled that where a court rightfully takes
> "jurisdiction over the parties and the subject-matter
> "of a controversy it has the right not only to render
> "judgment in the first instance, BUT ALSO TO SECURE TO
> "THE PREVAILING PARTY THE FRUITS OF SUCH JUDGMENT,
> "AND THE ORIGINAL JURISDICTION IS A CONTINUING ONE
> "FOR THAT PURPOSE. * * *"

Lamb *vs.* Ewing (*supra*).

And in CRANE *vs.* BUCKLEY (*supra*) it was said:

"It has been held that such a controversy is one "springing out of a suit already determined in the "Federal Court and is in one sense an offshoot of that "suit. Seymour *vs.* Construction Co., Fed. Cas. No. "12,689; 7 Biss., 460; * * * * And in Arnold *vs.* Frost "(Fed. Cas. No. 558; 9 Benedict, 267)—a suit for re- "covery on a bond given on appeal—the Court in posi- "tive terms declared it to be not an original suit, but "an offshoot or out-branch of the suit in which the "bond was given, and that jurisdiction of the original "suit gave jurisdiction over the subject-matter of the "suit on the bond."

Crane *vs.* Buckley (*supra*).

POINT III.

Against the array of authority referred to, the plaintiff in error has been unable to cite a single contrary decision, and the decisions relied upon by it are without application, and its contentions based thereon are altogether without merit.

FIRST: The contention that a case is not one "arising under the Law of the United States," unless the construction, scope or validity of the Statute is expressly in controversy, is wholly unfounded.

(1st) DISTRICT JUDGE AMIDON, sitting in the DISTRICT COURT OF NORTH DAKOTA in MCGOON *vs.* NORTHERN PACIFIC RAILWAY CO. (204 Fed. Rep., 998), harmonized the various decisions and stated the following pertinent views:

"So far as I am aware, the following is a correct "affirmative rule:

"Whenever federal law grants a right of property or of action, "and a suit is brought to enforce that right, such a suit arises under "the law creating the right, within the meaning of statutes defining "the jurisdiction of federal courts. * * *

"Jurisdiction upon the ground that the case arises "under the Constitution or laws of the United States

"cannot be shown by the answer or petition for re-
"moval, or by averments in the complaint as to the
"issue which the defendant will raise by his answer.
"(Citing cases). That jurisdiction must be shown
"wholly by plaintiff's statement of his own cause of
"action. Every such cause of action, however, is made
"up of matters of fact as well as law, and it must be en-
"tirely plain that the plaintiff by his statement of his
"own cause of action cannot show whether the defend-
"ant will take issue as to matters of fact or matters
"of law, and it is therefore impossible for the plain-
"tiff to show by his complaint that the case will 'really
" 'and necessarily involve a dispute or controversy
" 'as to a right which depends on the construction of
" 'the Constitution or some law or treaty of the United
" 'States.' It necessarily follows that such a rule
"(that it must appear that there will be a controversy
"as to the construction of the Constitution or Laws of
"the United States), if pressed to the extreme point
"for which plaintiff contends, would wholly destroy
"jurisdiction under this head, by prescribing conditions
"with which no plaintiff can ever comply. Congress,
"however, has declared that the District Court shall
"have jurisdiction of cases arising under the Constitu-
"tion and laws of the United States. This language is
"plain, and ought not to be wholly nullified by a pro-
"cess of reasoning which professes to ascertain its
"meaning. An interpretation which leads to such
"absurd results must be wrong.

**"What, then, do the courts mean when they say that the con-
"struction of federal law must be involved in order to confer this
"jurisdiction? Certainly not that the case will necessarily turn
"upon an interpretation of the statute, but simply that the complaint
"must set forth a cause of action of which federal law is an essential
"ingredient, and which may, therefore, properly involve a construc-
"tion of that law. * * ***

"The line of distinction which it seems to me will
"go far to harmonize the cases is this: When the com-
"plaint shows a case which arises out of a contract or a
"common-law right of property, and only indirectly
"and remotely depends on federal law, such a case not
"only does not, but cannot properly, turn upon a con-
"struction of such law. **But when the complaint asserts a
"right created by federal law, it presents a suit which may properly
"turn upon a construction of that law; and such a suit 'arises out**

"'of' the law for purposes of federal jurisdiction, notwithstanding "the defendant may raise only issues of fact by his answer."

McGoon *vs.* Northern Pacific Railway Co. (*supra*).

(2nd) In support of its contention that the present action is not one arising under a Federal law, two decisions by this Court are cited by the plaintiff-in-error.

Shulthis *vs.* McDougal, 225 U. S., 561;
Taylor *vs.* Anderson, 234 U. S., 74.

Both of those cases involved rights to land acquired under the laws of the United States restricting the alienation of lands allotted to Indian tribes. The Statutes simply constituted the sources of title and it did not appear by the bills that the immediate controversy in any way involved the validity of the title thus acquired.

Mr. Justice Van Devanter wrote the opinion in both cases. In the Shulthis case he said:

> "True, it contains enough to indicate that those "statutes constitute the source of the complainant's "title or right, and also shows that the defendants are "in some way claiming the land, and particularly the "oil and gas, adversely to him; but beyond this the "nature of the controversy is left unstated and uncer- "tain. Of course, it could have arisen in different "ways, wholly independent of the source from "which his title or right was derived. So, looking "only to the bill, as we have seen that we must, it "cannot be held that the case as therein stated was "one arising under the statutes mentioned."

Shulthis *vs.* McDougal (*supra*).

In the Taylor case the action was ejectment, and the petition, going beyond what was necessary to state a good cause of action, alleged that the defendants were asserting ownership under a deed which was void under the legislation of Congress restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians. These allegations, it was said by the learned Justice, were neither essential

nor appropriate in the petition and were inserted merely to anticipate and avoid a defense which it was supposed the defendants would interpose:

> "It is now contended that these allegations showed "that the case was one arising under the laws of the "United States,—namely, the acts restricting the alien- "ation of Choctaw and Chickasaw allotments,—and "therefore brought it within the circuit court's juris- "diction. BUT THE CONTENTION OVERLOOKS REPEATED DE- "CISIONS OF THIS COURT BY WHICH IT HAS BECOME FIRMLY "SETTLED THAT WHETHER A CASE IS ONE ARISING UNDER "THE CONSTITUTION OR A LAW OR TREATY OF THE UNITED "STATES, IN THE SENSE OF THE JURISDICTIONAL STATUTE "(NOW §24, JUDICIAL CODE), MUST BE DETERMINED FROM "WHAT NECESSARILY APPEARS IN THE PLAINTIFF'S STATE- "MENT OF HIS OWN CLAIM IN THE BILL OR DECLARATION, "UNAIDED BY ANYTHING ALLEGED IN ANTICIPATION OR "AVOIDANCE OF DEFENSES WHICH IT IS THOUGHT THE DE- "FENDANT MAY INTERPOSE.
>
> Taylor *vs.* Anderson (*supra*).

All that that case held, therefore, was that where the cause of action sued upon did not show a Federal question, such a question could not be injected by alleging in the statement of claim filed an anticipatory defense which the defendant might or might not set up.

The assertion, therefore, by the plaintiff-in-error that the entire argument upon which the decisions in SEYMOUR *vs.* PHILLIPS & COLBY CONSTRUCTION COMPANY (*supra*) and CRANE *vs.* BUCKLEY (*supra*) rest "has been disposed of by "two recent adjudications of this Court in which the opin- "ions were delivered by Mr. Justice Van Devanter, defin- "ing clearly what is meant by a case arising under a law "of the United States," is altogether unwarranted, as neither decision in any way involved a suit on a bond given under a Federal Statute, and in no way referred to or questioned the basis upon which those decisions and other analogous cases rest.

SECOND: Nor is the contention sound, that for the purpose of jurisdiction, a plenary action may not be incidental and ancillary to another suit, in the same court, as well as a summary proceeding by motion.

1st. WHETHER OR NOT A PROCEEDING IS ANCILLARY OR INCIDENTAL IS NOT TO BE DETERMINED BY ITS FORMAL CHARACTER OR BY THE PROCESS BY WHICH IT IS INITIATED, BUT BY ITS OBJECT. IF ITS PURPOSE IS TO GIVE EFFECT TO THE PROCEEDINGS, JUDGMENT OR DECREE IN A FORMER SUIT IN THE SAME COURT OR TO SECURE THE FRUITS AND BENEFITS THEREOF OR TO OBTAIN ANY RELIEF GROWING OUT THEREOF AND HAVING DIRECT REFERENCE THERETO, THEN IT IS NOT AN ORIGINAL, BUT A DEPENDENT AND ANCILLARY SUIT.

The following actions, although plenary in character and begun by original process, were held not to be independent, but dependent and ancillary:

(A) *An action to set aside a judgment for fraud.*

Pacific R. R. Co. of Missouri *vs.* Missouri Pacific Ry. Co., 111 U. S., 505;
Carey *vs.* Houston & Texas Central Ry. Co., 161 U. S., 115.

In the first case MR. JUSTICE BLATCHFORD said:

"On the question of jurisdiction, the suit may be "regarded as ancillary to the Ketchum suit, so that the "relief asked may be granted by the court which made "the decree in that suit, without regard to the citizen- "ship of the present parties, though partaking so far "of the nature of an original suit as to be subject to the "rules in regard to the service of process which are "laid down by Mr. Justice Miller in Pacific R. R. Co. "*v.* Mo. Pacific R. Co., 1 McCrary, 647. The bill, "though an original bill in the chancery sense of the "word, is a continuation of the former suit, on the "question of the jurisdiction of the circuit court."

Pacific R. R. Co. of Missouri *vs.* Missouri Pacific Ry. Co. (*supra*).

(B) *An action to enjoin an action at law on a replevin bond given in a suit brought in the State Court and removed to the United States Court.*

Kern *vs.* Huidekoper, 103 U. S., 494.

MR. JUSTICE WOODS, writing, said:

"The bill in this case was, therefore, ancillary to "the replevin suit and was in substance a proceeding in "the Federal Court to enforce its own judgment by "preventing the defeated party from wresting the re-"plevined property from the plaintiffs in replevin, who, "by the judgment of the Court, were entitled to it, or "what was in effect the same thing, preventing them "from enforcing a bond for the return of the property "to them."

Kern *vs.* Huidekoper (*supra*).

(C) *An action by a person whose property had been wrongfully taken under process by a United States Marshal to recover such property by proceedings in the Court in which the process issued.*

Coville *vs.* Heyman, 111 U. S., 176.

(D) *An action in equity brought to regulate a judgment or a suit at law in the same Court.*

Krippendorf *vs.* Hyde, 110 U. S., 276;
Johnson *vs.* Christian, 125 U. S., 642.

(E) *An action affecting property in the hands of a receiver.*

Milwaukee & Minnesota R. R. Co. *vs.* Soutter, 69 U. S., 609.

MR. JUSTICE MILLER said:

"It is not a question whether the proceeding is "supplemental and ancillary or is independent and "original in the sense of the rules of equity; but "whether it is supplemental and ancillary or is to be "considered entirely new and original in the sense "which this Court has sanctioned with reference to the "line which divides the jurisdiction of the Federal "Courts from that of the State Courts. No one, for "instance, would hesitate to say that according to "the English Chancery practice a bill to enjoin a judg-"ment at law is an original bill in the Chancery sense "of the word. Yet this Court had decided many times

"that when a bill is filed in the Circuit Court to enjoin "a judgment of that Court it is not to be considered "as an original bill, but as a continuation of the pro- "ceeding at law; so much so that the Court will pro- "ceed in the injunction suit without actual service of "subpoena on the defendant, and though he be a citi- "zen of another state, if he were a party to the judg- "ment at law."

Milwaukee & Minnesota R. R. Co. *vs.* Soutter (*supra*).

(F) *An action to enforce a lien upon property under foreclosure.*

McBee *vs.* Marietta & N. G. Ry. Co., 48 Fed. Rep., 243;
Hatcher *vs.* Hendrie & Bolthoff Mfg. & Supply Co., 133 Fed. Rep., 267.

In the HATCHER case (*supra*), CIRCUIT JUDGE VAN DEVANTER, writing for the CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, said:

"So a suit is dependent and ancillary the object "of which is to enforce an attachment lien obtained in "a former action in the same Court and to subject the "attached property, or the proceeds of its sale, to the "satisfaction of a judgment recovered in that action. "Such a suit is supplementary merely to the former "action and is a continuation thereof so far as the ques- "tion of jurisdiction is concerned."

Hatcher *vs.* Hendrie & Bolthoff Mfg. & Supply Co. (*supra*).

Whether, then, a suit is to be regarded as original or ancillary, is determined, not, as asserted by the plaintiff-in-error, by its formal nature and the process by which it was initiated, but by its relation to previous litigation in the same Court and by the relief demanded.

Under such a test the present action is clearly ancillary and incidental to the original suit in which the bond was given.

(2nd) The only decisions cited by the plaintiff-in-error are:

Reilly *vs.* Golding, 10 Wall, 56;
Hiriart *vs.* Ballou, 9 Peters, 156;
Smith *vs.* Gaines, 93 U. S., 341;
Beall *vs.* New Mexico, 16 Wall, 535;
Moore *vs.* Huntington, 17 Wall, 417.

Not one of them holds that a plenary suit begun by original process may not be incidental or ancillary to another action in the same Court.

They are simply to the effect that where the procedure of the State in which the proceeding is brought allows the enforcement of a bond on motion, such practice is also applicable to a proceeding in a Federal Court sitting in that State.

THIRD: Decisions to the effect that an action on a judgment rendered by a Federal Court is not one of which a Federal Court has jurisdiction in the absence of diversity of citizenship, are clearly without any application whatsoever.

The cases cited by the plaintiff-in-error are:

Provident Savings Society *vs.* Ford, 114 U. S., 635;
Metcalf *vs.* Watertown, 128 U. S., 586;
Carson *vs.* Dunham, 121 U. S., 421.

The basis of these decisions as stated by Mr. Justice Harlan in the Metcalf case is that such actions are simply "TO ENFORCE AN ORDINARY RIGHT OF PROPERTY BY SUING UPON THE JUDGMENT MERELY AS A SECURITY OF RECORD."

FOURTH: The decision in Tullock vs. Mulvane (184 U. S., 497), is not an authority in favor of the contention of the plaintiff in error.

That action was brought in a State Court upon an injunction bond given in a Federal Court, and came before this Court on writ of error to the State Court.

The jurisdiction of this Court in such a case is not

based alone on the fact that the action is one arising under the Laws of the United States, but it must appear by the record that a Federal right has been claimed and denied by the State Court. The searching of the record by this Court in the case referred to, made so much of by the plaintiff-in-error, was for the purpose of determining whether or not it was shown by the record before it, that a Federal question had been presented to and decided by the State Court.

Instead of this decision in any way helping out the plaintiff-in-error, it clearly is one in favor of the contention of the defendant-in-error and is cited and relied upon by him under POINT I of this brief.

FIFTH: The assertion that the proper theory upon which suits on contractors' bonds and bonds given by marshals and clerks of the United States Courts are brought, is that in such cases the United States is the real party plaintiff is altogether an incorrect statement of the law.

In the brief of the plaintiff-in-error, it is said:

> "Whatever doubt might have been previously entertained as to the proper theory upon which the suits were maintainable (i. e., on bonds of contractors, marshals and United States clerks), has been dispelled by the decision of this Court (U. S. Fidelity Co. *vs.* Kenyon, 204 U. S., 349) in which the Court expressly held that the correct basis of decision was that although the suit might be brought by a private individual in the name of the United States, that the United States had a real interest in the obligation of the bond being fulfilled, * * * * *"

See Brief for Plaintiff-in-Error, p. 14.

This is an entirely incorrect and misleading statement of the basis of the decision referred to. What was there held was that an action brought upon the bond of a contractor for a public work was maintainable in the Federal Courts, IRRESPECTIVE OF THE AMOUNT INVOLVED, because the United States was the real, and not merely the nominal, plaintiff, and set at rest the previous doubt expressed in IN RE HENDERLONG (102 Fed. Rep., p. 2), as to whether such

an action were maintainable IF THE AMOUNT IN CONTROVERSY WAS LESS THAN THE JURISDICTIONAL AMOUNT REQUIRED BY THE STATUTE.

It in no way questioned the right to maintain such an action as one arising under the Laws of the United States IF THE REQUISITE JURISDICTIONAL AMOUNT WERE INVOLVED.

POINT IV.

Damages at the rate of ten per cent. upon the amount of the judgment should be awarded in favor of the defendant in error.

FIRST: BY RULE XXIII OF THIS COURT IT IS PROVIDED:

> "2. In all cases where a writ of error shall delay "the proceedings on the judgment of the inferior Court, "and shall appear to have been sued out merely for "delay, damages at a rate not exceeding ten per cent., "in addition to interest, shall be awarded upon the "amount of the judgment."

SECOND: In the face of the many express decisions upholding the jurisdiction by Federal Courts of actions of the nature of the present one, and the absolute dearth of any contrary ruling, it is respectfully submitted the demurrer in the case at bar obviously was interposed wholly for the purpose of delay and to prevent the collection by the defendant in error of the judgment recovered in his favor.

Although the breach of the contract entered into occurred as early as January, 1910, and although the action to enforce damages for the breach was begun on April 30th, 1912, and the judgment in the plaintiff's favor was rendered on June 14th, 1913, and affirmed by the Circuit Court of Appeals and its mandate handed down on July 1st, 1914, the plaintiff-in-error, by the interposition of the frivolous demurrer in the present action, has prevented the defendant-in-error from receiving his just due.

While no complaint is made as to the right of Whit-

comb to a full and fair trial and to a full and fair review of the judgment rendered against him, both of which he has had, complaint is made of the use by him and his surety of the forms of law, coupled with their ability to give bonds to stay execution against them, to prevent the payment of their just debts and obligations.

It is respectfully submitted that this case is eminently one where a writ of error has been sued out to delay the proceedings on the judgment of an inferior Court, and which has had that direct effect, and that damages at the rate of ten per cent. should be awarded on the amount of the judgment.

POINT V.

The judgment should be affirmed, and damages at the rate of ten per cent. should be awarded upon the amount of the judgment.

Abram J. Rose,
Alfred C. Petté,
Philip M. Brett,
Counsel for Defendant-in-Error.

UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

JAMES A. WHITCOMB,

vs.

GEORGE S. SHULTZ.

Before:

LACOMBE, WARD & ROGERS, *JJ.*

WARD, *J.*

The Great American Automatic Vending Machine Company, plaintiff's assignor, agreed to manufacture for the Robertson Sales Company 10,000 vending machines like a model submitted. The defendant Whitcomb became surety for the faithful performance of the contract by the Sales Company. By January 1, 1910, the Vending Company had delivered 2100 machines, after which date the Sales Company refused to receive any more. Thereupon the plaintiff brought this action at law against the defendant as surety, to recover the damages sustained by the Vending Company, being first, the balance due unpaid upon the 2100 machines delivered, with interest at six per cent.; second, the cost of materials purchased for the manufacture of the 10,000 machines, less what was used in the 2100 delivered; third, the profits on the 7900 machines remaining to be delivered. The jury returned a verdict for the plaintiff. This is a writ of error to a judgment entered thereon.

Many errors are assigned because of Judge Mack's refusal to charge as requested, but we think that his charge was full, careful and impartial and properly covered the requests.

The defendant relies greatly on the proposition that the plaintiff did not manufacture the machines because it employed other parties to make many of the parts and

therefore has no cause of action. The Court rightly charged the jury that the plaintiff's assignor was not obliged itself to manufacture all the parts. There was evidence that the model submitted was manufactured in the same way and that the officers of the Sales Company knew before they repudiated the contract that the Vending Company was itself making only some parts of the machine, employing third parties to make other parts.

The material question was whether the Vending Company manufactured machines substantially like the model. If it did, it performed its contract. It was not responsible for the operation of the machines. This question was fully and fairly presented to the jury, who decided it in the plaintiff's favor upon a conflict of testimony and this finding is binding upon us.

The defendant also contends that the plaintiff failed to perform the contract because it did not keep in its possession the dies, patterns, etc., so as to be able to conform to the requirement of the contract that it should deliver the same to the Sales Company upon its demand in first class condition upon the completion of the contract. This is a quite immaterial consideration, because the contract never was completed, having been repudiated by the Sales Company after 2100 machines had been delivered.

The trial occupied nearly three weeks and the defendant took a multitude of hypercritical exceptions to the proof of damage offered by the plaintiff. The unpaid balance due upon the machines actually delivered was a mere question of mathematics. In respect to the cost of material ordered by the plaintiff's assignor, there was primary proof, confirmed by the receipted bills of the vendors and the plaintiff's checks in payment thereof. Finally, there was evidence as to the cost of making the machines as compared with the price the plaintiff was to receive, showing the loss of profits. There was sufficient competent evidence to enable the jury to determine the amount of the plaintiff's damages with reasonable certainty and we are not disposed to be astute to discover and discuss errors in this long trial which in our opinion were harmless. The judgment is affirmed.

Opinion, Hand, J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES A. WHITCOMB,

against

GEORGE S. SHULTZ.

HAND, *D. J.*:

The theory of the bill is this: The Machine Company in order to procure the contract represented that they had themselves all the mechanical and industrial means for making the whole machines in their shops, and that they meant to make them there. In fact, unknown to the plaintiff, they had no such facilities and never did make them in the shops nor did they ever intend to do so. This was a fraud which justifies the cancellation of the contract.

There is a very simple and conclusive answer to this reasoning, that is, that as the contract entered into did not require the Machine Company to build the machines in their shops, but only to deliver machines made like the model, the fact is quite immaterial that they could not have done them in their shops. It has now been finally and authoritatively adjudicated between the parties in the action at law that the contract has the interpretation which I have just mentioned and that puts an end to the case. Fraud must touch some matter material to the action of the injured party; it must be a statement about facts whose truth would have kept the victim away from his injury. If the injury of which he complains is entering into a contract, as here, then it must appear that knowledge of the facts would have resulted in his refusing the contract. If the contract allowed the Machine Company to manufacture anywhere,

it is impossible to see how knowledge of the fact that they must manufacture out of their shops, could be material. If the contract was as Whitcomb contended upon the trial of the action at law, a contract to manufacture in the Machine Company's shops only, then the false statements would have constituted fraud, and to manufacture out of the shop would have been insufficient performance.

Of course, a contract may through fraud fail to represent the true intent of the parties and may be reformed for that reason, but no such question is raised here. The plaintiff obviously could not now take that position, and we must suppose that the contract correctly embodied the purpose of the parties to allow the machines to be made anywhere and assembled by the Machine Company. It may perhaps be still further argued, that, although the contract allowed the machines to be made elsewhere, the assurances of the Machine Company gave the plaintiff to suppose that they would in fact be made in the shop. Such an assurance can hardly be the basis of any right when accompanied by a formal undertaking which imposes different obligations, but even if we should assume that it might be the basis of an action for deceit or upon a collateral contract, at least it is absurd to talk about it as a fraud which resulted in the execution of this contract.

If these facts could constitute any such fraud, they would have been a good defense in the action at law because they would have shown that the Machine Company had not substantially performed. They were unsuccessful in that action because the contract was more liberally interpreted and the same interpretation makes it quite impossible to urge that there was any fraud which justifies cancelling the contract. That the court put this construction upon the contract the record abundantly proves. My reliance is upon the judge's charge, and especially upon that part contained between folio 1778 and folio 1790. Here it appears that the only material question left to the jury was whether the machines when made corresponded with the Plumb model; if so, it made no difference where the parts were made. "I find nothing in this contract to justify a claim that the Ma-

chine Company itself had to manufacture all of the parts and all dies, patterns and special tools personally and had to manufacture all those dies, patterns and special tools, for each and every distinct part" (fol. 1780).

The motion is denied. I will give no stay pending an appeal, unless the plaintiff can show me that Shultz is not responsible, nor then either, if the Machine Company will agree to pay any judgment against Schultz, unless the Machine Company is also shown to be irresponsible. In those cases I may consider that question.

July 18, 1914.

LEARNED HAND,
D. J.

Memorandum, Lacombe, J.

Indorsed on the Notice of Motion for judgment on Pleadings.

"I concur fully with Judge Hand's opinion; the motion is granted.

Aug. 4, '14.

E. H. LACOMBE,
U. S. Cir. J."

Whitcomb *v.* Shultz—Equity 11-288.